Supreme Court, U.S.
FILED
APR 6 - 2006
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No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY NON-FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Cases and Statute

McHugh v. University of Vermont,
966 F.2d 67 (2d Cir. 1992) 2

Wood v. United States,
995 F.2d 1122 (1st Cir. 1993) 2

Westfall Act, 28 U.S.C. § 2679 1

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY NON-FEDERAL RESPONDENTS

Petitioner Ms. Pat Osborn respectfully files this reply to the Brief in Opposition ("BIO") filed by the non-federal respondents, Gaye Luber ("Luber") and Land Between the Lakes Association, Inc. ("LBLA").

ARGUMENT

Both petitioner and the Solicitor General (representing federal respondent Barry Haley) agree that this Court should grant review to resolve two long-standing splits in the courts of appeals concerning the Westfall Act, 28 U.S.C. § 2679. Luber and LBLA—the two non-federal respondents—have filed a brief in opposition, stating that they "cannot agree with the United States that the Court should review" the first question presented. BIO at 15. For three simple reasons, however, this opposition does not detract from the obvious conclusion that the petition should be granted.

1. Luber and LBLA, though nominal respondents, have no concrete legal interest in a proper resolution of the first question presented. Luber and LBLA have no employment relationship with the United States Government and thus no rights under the Westfall Act. As the Solicitor General accurately states, the Act "confers personal immunity on *federal employees* from all common-law tort claims arising out of acts taken within the scope of their employment." Brief for Respondent Barry Haley ("Haley Br.") at 2 (emphasis added). In contrast to petitioner (as plaintiff) and to Haley (a U.S. Forest Service employee), Luber and LBLA have no interest in whether and how federal employees are accorded immunity from tort claims. The federal interest, moreover, is represented by the Solicitor General, who recommends that "the Court should grant review" of the first question presented. *Id.* at 17. (Luber and LBLA concede that if the Court accepts the Solicitor General's recommendation as to the first question, it should grant review of the second question as well. *See* BIO at 15.)

2. Luber and LBLA assert that "[t]he Petition rests upon a mistaken premise," *id.* at 1, and then seek to show that the district court made certain other errors of fact or law as to respondent Haley, *see id.* at 2-7. But the United States took an appeal to the Sixth Circuit on Haley's behalf, raising the issues it deemed proper and prevailing in that court. The Sixth Circuit, of course, took a view of the record starkly different from that portrayed by the brief in opposition. *Compare* Pet. App. 3a ("[T]he United States conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment."), *with* BIO at 1 ("The United States has ***not*** conceded that its employee's alleged conduct was outside the scope of his employment if it occurred." (emphasis added)). The record as characterized by the court of appeals—not by parties having no interest in the issues—ought to frame this Court's consideration of questions presented on certiorari. Here, two questions "that have split the circuits" for quite some time, Pet. App. 2a, are squarely presented by the record as understood by both lower courts.

3. Luber and LBLA impugn the Solicitor General's recognition of "the circuit conflict on the first question presented" (Haley Br. at 18) on the theory that a "[r]emand of this case to the district court for a hearing on the scope of employment issue is consistent with *McHugh* and *Wood*." BIO at 10 (referring to *McHugh v. University of Vermont*, 966 F.2d 67 (2d Cir. 1992), and *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc)). The only flaw in this argument is that both of the courts below concluded otherwise. The district court opined that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications"; on that basis, the court *refused* to hold a hearing on the scope-of-employment issue. Pet. App. 15a. In reversing that refusal and ordering a hearing, the Sixth Circuit ruled that "the district court erred in relying on the First Circuit's decision in *Wood*," Pet. App. 8a, and so the court of appeals sided with those decisions that "expressly or impliedly reject the *Wood* majority's [and *McHugh*'s] approach," Pet. App. 7a.

In short, everyone but Luber and LBLA—who have no concrete interest in the federal issues—acknowledges the reality of a circuit conflict here. The court below recognized it, and both petitioner and the Solicitor General (on behalf of the sole federal respondent) agree that certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 2006